

## Sources of Islamic Law: Views of Mawlana Amin Ahsan Islahi

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### Abstract

*Sources of Islamic law remain a subject of discussion not only in the classical Muslim scholarship but also in the present day religious discourse. Scholars of Islamic jurisprudence declared Qur'an, the Sunnah, Ijma' and Qiyas as the sources of Islamic law. This view has been widely accepted by theologians and common Muslims. The institutions imparting modern education in Islamic disciplines also accepted the same view on the sources of Islamic law. Mawlana Amin Ahsan Islahi, a steadfast religious scholar of the 20th century touched the subject and expressed his view vividly in his writings and speeches made to audiences including the modern educated segment of society. On many occasion Islahi's views particularly on the sequences of these sources are different from the traditional and popular views. In the following pages an effort is made to describe and analyse the views of Islahi on the subject and wherever it was possible comparison was made with other ulama and with the modern educated intellectuals of Pakistan. Islahi took a different stand on the subject notwithstanding with neither of the ulama and nor with the modernists.*

**Keywords:** Unique status of the Quran, Principles of the Quran's exegesis, Four sources of the Islamic Law

### Mawlana Amin Ahsan Islahi (1904-97):

Mawlana Amin Ahsan Islahi belonged to an agricultural family in a village in Bamhur in Uttar Pradesh (UP) whose father Muhammad Murtaza was a religious person. Islahi was enrolled in Madrasat ul Islah from where he completed his education in 1922. After serving in a magazine *Ghuncha*, in 1925 he accepted the invitation of Mawlana Hamiddudin Farahi to come and stay with him and study Quran from him. Islahi remained with Farahi for about six years till he died in 1930 and got his specialization in the Quranic studies. Islahi joined Madrasat ul Islah as a teacher where he also organized the translation and publication of Farahi's treatise till he was requested by Mawlana Mawdudi to join him in Pathankot which he accepted in 1944. Soon his

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status elevated next to Mawdudi in the Jamaat-i-Islami. In late 1950s differences developed between these two scholars which ended in the resignation of Islahi from the Jamaat in 1958. The main issue of departing his ways was the status of Shura in the Muslim collective life. Islahi uphold the view that the act and decisions of the shura should be binding upon the amir while Mawdudi was of the other view. After his dissociation from Mawdudi, Islahi concentrated on his project of writing an exegesis of the holy Quran on the basis of *nazm* (structural and thematic coherence in Quran) principle primarily advocated by Farahi. Islahi completed his *magnum opus*, *Taddabur-i-Quran* (nine volumes) in 1980. Islahi's thought are immensely influenced by Farahi and his *alma mater*, Madrasat ul Islah. Though he joined Jamaat-i-Islami but he preserved his own distinction of being a religious scholar of no less than anyone in the Jamaat. Islahi contributed enormously in the character building of the workers of the Jamaat during his stay in the Jamaat. He stayed away from the corridor of power and expressed his views openly which sometime attracted sever criticism even from the ulama.

Islahi's thought on the sources of Islamic law appeared in three of his books, *Islami Qanuwn ki Tadwin* (Codification of Islamic Law), *'Aili Commission Report par Tabsirah* (a Commentary of the Family Laws Commission)<sup>1</sup> and *Islami Riyasat mayn Fiqhi Ikhtilafat ka Hal* (Juristic Differences and How to Resolve it in an Islamic State). In some places his views are supported from his exegesis, *Taddabur-i-Quran*.

Islahi after narrating the four sources of Islamic law; Quran, Sunnah, Ijma and Qiyas as enunciated by the religious scholars questioned its order and contents. He does not agree with the order and raise certain questions on it and then he forwarded not only his own order but also added or reallocated content of the four sources of law.

The first question which Islahi raised is the place given to *ijma'* in this order. He opined that *ijma* is placed as third source of law while it should be *ijtihad* that should come after the Qur'an and *Sunnah*. The second problem is that *qiyas* has been assigned fourth position while *qiyas* is not a separate and independent source of Islamic law; rather it is a form of *ijtihad*. The third problem which arises is that it does not cover all the sources of Islamic law: for example, '*urf (rawaj* or custom) and likewise *maslahat* (expediency) are also sources of this law. Islahi

draws his own classification of the sources of Islamic law into five i.e. the Qur'an, the *Sunnah*, *Ijtihad*, *'Urf* and *Maslahat*.<sup>2</sup>

Qur'an is the first source of Islamic law and the entire Muslim community is unanimous on this fact. It is the revealed word of God. Some people like Ghulam Ahmad Pervez went further and declared Qur'an as the only source of Islamic law. The Qur'an is found in a book shape, but there are certain characteristics attached with this book. According to Islahi, anyone who wants to consult and benefit from this book for Islamic jurisprudence became perplexed in the first instance, because it is different from other books. Book contains a theme, topic, chapters and paragraphs. Each and every part of the book is not only concerned with the main theme but also connected with each other. However, apparently, Qur'an does not qualify for any of these characteristics. Therefore, before consulting Qur'an, it must be born in mind that it is not compiled on the pattern of ordinary codes of jurisprudence and law. It contains beliefs, articles of faith, moral codes, admonition, historical events and allegories all mixed. Digging out legal statute from all these things is not easy and every person cannot perform the job. Those who fully understand all aspects of the Qur'an only can do it. In legal literature each dot and dash are important.<sup>3</sup> The second important requirement is mastery of the Arabic language and literature. According to Islahi, the language of the Qur'an is different from the language presently in use in the Arab world.<sup>4</sup> A scholar of the Qur'an cannot appreciate most of the finer points and beauty of the Qur'an unless he is familiar with the genius literature of the days of revelation of the Qur'an. Islahi has been lamented by some religious scholars because of giving more importance to *adab-i-jahiliyah* (literature of the period of ignorance).<sup>5</sup> Islahi regrets that in modern age certain scholars are interpreting the text of the Qur'an from its translations.<sup>6</sup> The third requirement for the study of the Qur'an is the knowledge of the background of the Arab history, particularly since the time of the Prophet Abraham. A scholar must posses the knowledge of the *rawaj* (customs), *ma'ruf* and *munkar* of the Arabs, the characteristics of their religious belief and practices.<sup>7</sup> The scholars should also have full acquaintance with the commandments and Law of Moses and Jesus and their followers.<sup>8</sup> All such background knowledge would benefit a jurist to fully comprehend the text of the Qur'an, and the meaning of each word and its specific use in the text. The hidden treasure of the

Qur'an cannot be explored unless the concept of *Nazm* (coherence) in the Qur'an is accepted. Islahi always stresses upon the point and he succeeded to dispel the impression of many scholars (both from the West and the Muslims) that there is no coherence in the Qur'an. Among the Muslim scholars, it is opined that God sent his orders and instructions to the holy prophet and the Muslims at different times. These scattered orders and instructions can be found in the Qur'an. By implication, it means that Qur'an is compilation of these scattered orders. Shah Walliullah opined that Qur'an contains five kinds of teachings including, i. Injunctions (*ahkam*) ii. Disputation (*mukhasamah*), iii. Reminding man of Divine Favours, iv. Reminding man of Divine Events, v. Reminding man of Death and After Death.<sup>9</sup>

Qur'an is immutable and valid for all the time and all the places. There are certain theologians and scholars, who are of the opinion that Qur'an can be abrogated by *Sunnah* (they mean Hadith).<sup>10</sup> Islahi does not agree with this view and he asserts strongly that Hadith couldn't abrogate Qur'an.<sup>11</sup> There are certain occasions that Qur'anic verses have been abrogated but it was through the revelation of other verses and both kinds of verses presently exist in the Qur'an. None of the religious sources can be matched with the Qur'an. Qur'an dominates all the other sources because its authenticity is unquestionable.

The second source of Islamic law is *Sunnah*. Islahi use the term '*Sunnah*' and not Hadith, because he differentiated both these terms from each other. A considerable number of Muslim scholars in the past used these words synonymous. The Ahl Hadith School, currently, strongly upholds this view.<sup>12</sup> In the writings of Mawdudi, Sulayman Nadwi, and Farahi one can find implicitly that these scholars differentiate *Sunnah* from Hadith. However, Islahi explicitly stated that *Sunnah* is different from Hadith. Hadith has been defined as saying, actions, rectification, and characteristics of the holy prophet. While the literal meaning of *Sunnah* is 'a clear path', 'busy path' and 'beaten path'. Islahi cited two verses of the Qur'an in which the word *Sunnah* is used as *Sunnah* of Allah. For instance, "There can be no difficulty to the Prophet in what Allah has indicated to him as a duty. It was the practice (approved) of Allah amongst those of old that have passed away and the command of Allah is a decree determined"<sup>13</sup> and "On account of their arrogance in the land and their plotting of Evil. But the plotting of Evil will hem in only the authors thereof. Now are they but looking for the way the

ancients were dealt with? But no change wilt thou find in Allah's way (of dealing): no turning off wilt thou find in Allah's way (of dealing)." <sup>14</sup> Islahi is of the opinion that *Sunnah* is confined only to the practical aspect of life i.e. what has to be done. Moreover, all those things which are related to beliefs and intellectual pursuits are out of its domain. The status of *Sunnah* is binding on all the Muslims, as in the case of the details in prayers i.e. timings, total number and number of *rakat* for each prayer. The same is the case of the punishment of theft which is discussed in the Qur'an, but the details have been left to the prophet.<sup>15</sup> Islahi considered the relationship of Qur'an and *Sunnah* as that of the soul with the body.<sup>16</sup> According to Islahi, the Qur'an is proved by the verbal adherence of the Muslim community. Likewise, the *Sunnah* is proved by the practical adherence of the Muslim community. Therefore, negation of one leads to the negation of other.<sup>17</sup> Islahi accepts some forgeries in the Hadith literature, but he concludes that on the basis of some cases, it is not appropriate to reject the whole Hadith literature. Islahi concedes the difference of opinion in the determination of *Sunnah*, but he terms it natural and asserted that such minor differences can be found anywhere in the world. The important thing is that all Muslims are agreed that *Sunnah* is the source of Islamic law.

Javed Ahmad Ghamidi, a student of Islahi, also focused on the subject which shows an advancement or rectification of the missing links in Islahi's views, regarding the difference in *Sunnah* and Hadith and the definition of the term *Sunnah*. He defined the term *Sunnah* as 'those traditions of the *din-i-Abrahim* which were adopted by the holy prophet after renewal and reformation and addition and to implement it among the Muslims as *din* (religion)'.<sup>18</sup> He also asserted that like Qur'an, there should not be any difference on the question of *Sunnah*. He listed twenty-seven entries in the domain of *Sunnah* e.g. prescribed methods of five times prayer, hajj and burial of a body etc. Ghamidi has been strongly criticised to reduce the *Sunnah* to only twenty seven in numbers.

After the basic sources of Qur'an and *Sunnah*, according to Islahi the third source is *Ijtihad* (literal meaning is to strive to the utmost). *Ijtihad* is the most important disputed issue in the contemporary Muslim world. The need and demand of *Ijtihad* is universal. Among the Muslim scholars, especially the traditionalists are very reluctant in the adoption

of *Ijtihad*. Some consider the door of *Ijtihad* closed after the earlier four great imams (founders of the *fiqh*) while others insist and consider it inevitable to cope with the new changing situation in human society. A considerable number of Muslim scholars consider Islamic law as complete in all of its details, especially after the works of the four great jurists. These jurists applied the teachings of Qur'an and *Sunnah* to find out solution of the problems faced by Muslims. Consequently, the present day Islamic *fiqh* literature is complete in its totality. A Muslim scholar of modern time can only search to find out the past expert opinion concerning these matters on which Qur'an and *Sunnah* is silent. In this way there is very little space left open for new law making. However, in a few cases implementation of some rules of the traditional *fiqh* might appear difficult. According to Mufti Muhammad Shafi, in such cases *Ijtihad* can be exercised to meet the difficulty.<sup>19</sup> Traditionalists are not ready to deviate even slightly from the thoughts of the earlier jurists. According to them, the Qur'an, *Sunnah*, Hadith and *Fiqh* are enough for solution of any problem in human life. Thus the 'gate of *Ijtihad* was closed for all time and the era of *taqlid* set in.<sup>20</sup>

A section of the Muslims, predominantly educated in the modern Western educational institutions, are overwhelming supporting unbridled *Ijtihad* in modern times. There is no doubt that these Muslims got much influence from the advancement of the Western thoughts and practices. For the views of this group, a representative document is the *Report of Marriage Commission* appeared in the Gazette of Pakistan on June 20, 1956. The commission was primarily constituted for reforms in the existing family laws in Pakistan, but it also touches upon certain concepts and theories of *Ijtihad* which had/has far reaching consequences for the society. Islahi was attracted to this report because it contained certain interesting and important points to ponder upon.

The commission adopted the meaning of *Ijtihad* as 'to exert and in the Islamic law this terminology refers to exert with a view to form an independent judgement on legal issue'.<sup>21</sup> Commenting upon the stagnation of Muslim jurisprudence in the past the commission refers to certain historical and political conditions. The commission opined that

"At the end of the creative Abbaside period the centres of Muslim civilisation were invaded and destroyed by Tartar

barbarians. Libraries and centres of learning were devastated; creative and progressive thinking became impossible. In order to save the structure of Muslim law it was deemed expedient to stop the activities of second rate innovators who could only make cultural confusion still further confounded. After this Muslim civilisation became stagnant and dormant and remained so till the awakening and stirring in the middle of the nineteenth century. Islam became identified with rigid orthodoxy in the matter of law, and the Western world which was recasting its life in the light of progressing knowledge and adapting itself to changing circumstances began to accuse Islam itself, dubbing it as an outworn creed incapable of adaptation to changing circumstances".<sup>22</sup>

Thus the door of *Ijtihad* was closed after the fourth century of Islamic era. The changing world, especially, after the rise of the West brought enormous changes in the social, political, economic and cultural life. The commission opined that, "These changes require a modern approach, new rules of conduct, and fresh legislation in almost all spheres of life and radical remodelling of the legal and judicial system."<sup>23</sup> The commission responded to the challenges and asserted that the remodelling would be carried out by 'men of knowledge'.<sup>24</sup> It further stated that sometime even the commoners could also repent those in authority. The commission cited an example in which a common woman gave corrected 'Umar the second pious caliph and gave a better judgement. Furthermore, all the great jurists and imams considered neither itself infallible, nor their disciples hesitated to differ with them.<sup>25</sup> This school of thought thus does not assign the task of *Ijtihad* to a group of the 'ulama. They opined that, "Some may be more learned in Muslim law than others but that does not constitute them as a separate class; they are not vested with any special authority and enjoy no special privileges."<sup>26</sup> The commission "accepted the principle of *Ijtihad* and does not consider the laws and injunctions of Islam to be infallible and unchangeable like the proverbial codes of Medes and Persians".<sup>27</sup> On the other hand, it asserted that "to go back to the original spirit of the Qur'an and *Sunnah* and lay special emphasis on those trends in basic Islam that are conclusive to healthy adaptation to our present circumstances".<sup>28</sup> The commission also held the view that,

“Distinction should be made between the injunctions on the basis of their universality or applicability to a particular structure of society in a particular epoch and in a particular region. The institution of slavery may be cited as an obvious illustration.”<sup>29</sup> The commission seems to approve each and every person to do *Ijtihad*. The commission reported, “law is ultimately related to life experiences which are not a monopoly of the theologians only. There are recorded cases in which unlearned women corrected the *khulifah* who gratefully acknowledged his error of judgement.”<sup>30</sup> Fazalur Rahman another modernist of Pakistan asserted that ‘fact is that it is the administrators who created Muslim laws and not the *fujahah* (jurist consult).’<sup>31</sup>

Islahi’s views on *Ijtihad* neither coincide with traditional ‘ulama nor did he endorse the opinion of the modernists. He realised the need of *Ijtihad* more and gives it more importance than the one given by the commission (modernists). He not only delivered his views on certain new arising issues but also evaluated *Ijtihad* of earlier jurists.<sup>32</sup> Problems keep sprouting in life. One has to look up to *Shariah* for answers to these problems, otherwise; the links of the lifeline with *Shariah* will break. In the words of Islahi, ‘if air and water are necessity for substances of our physical life, *Ijtihad* is far more vitally necessary for the blood-stream of our spiritual life.’<sup>33</sup> He further elaborated that ‘there is not a moment in ever-changing scene of life when a Muslim is not called upon to turn to Islam for *istifta* (seeking advice of *shariah*) on the affairs of life. It is for these reasons that it is impossible for a Muslim to sustain his faith without the help of *Ijtihad*.<sup>34</sup>

Islahi make a distinction between ‘an independent judgement on legal question’ and *Ijtihad*. He believes there is a difference between *Ijtihad* and the legal judgement and opinion of a modern jurist and legislator. He challenged members of the commission on the new meaning of *Ijtihad*. According to Islahi, *Ijtihad* means to strive the utmost and in Islamic legal language ‘it means in particular, to strive hard in search of a ruling based on deeper implications and hints underlying the commandments of the Book and *Sunnah*.<sup>35</sup> *Ijtihad* is a technical term and must be understand as experts of the field define it. There is a great difference between deriving commands from the main sources of Islam and the formulation of independent judgement on any legal question. To the modernists, *Ijtihad* ‘meant interpretation of the Qur’an and the

*Sunnah* in the light of modern ideas and needs, which in effect mean giving that construction to the texts which served their purposes'.<sup>36</sup>

The next important issue is who is capable to do *ijtihad*? Some Muslim scholars particularly the traditionalists entrusted the task to those who studied various religious disciplines in the traditional religious *madrasah*; the modernists see no harm that the legislature should take the responsibility. They asserted that legislature is the most suitable forum for *Ijtihad*. In fact, the modern legislature has performed *Ijtihad* in many fields. For example, in Pakistan, many issues were decided in the parliament and the 'ulama did not oppose that legislation, the relationship of state and its federating units and the relationship of different organs of the state etc. In the view of Khalifa Abdul Hakim, 'the learned men in the state should continue to reinterpret and revise the laws; they shall not be changed merely by the vote of the ignorant masses creating brute majorities.'<sup>37</sup>

The traditionalists have fears that if other than the 'ulama were allowed to do *Ijtihad*, then they may corrupt Islam for their ulterior motives. It was the same fear in the past, which caused the formulation of strict conditions for a *mujtahid*. No doubt, strictness of the jurists saved Islam from the encroachment of the opportunist 'ulama and the dictatorial rulers. However, it brought to a standstill the practice of *Ijtihad*. Modernists have lamented the conditions prescribed by jurists for *Ijtihad*.

Islahi does not agree with the 'ulama that for *Ijtihad*, certain persons should have qualification from certain *madrasah*; he also opposed the modernists who do not accept any criteria for doing *Ijtihad*. According to Islahi, every Tom, Dick or Henry cannot perform *Ijtihad*.<sup>38</sup> Only those can execute *Ijtihad* who are well-versed in the Qur'an and *Sunnah*; who have fathomed the depth of the Divine commandments; who are conversant with the entire structure of Islamic law and civilisation; who know the real nature and purport of the Islamic laws and injunctions. These people should have the faculty to evaluate the *Ijtihad* and *qiyyas* (analogy) of the past jurists such as Imam Abu Hanifa, Imam Malik, Imam Shafi and Imam Hanbal on the touchstone of Qur'an and *Sunnah*. In addition, these people must have the capability to point out the weaknesses of the past legists, and supplement their own *Ijtihad* with strong arguments.<sup>39</sup> According to Islahi, anybody can attain the required knowledge, and it is not essential to hold a degree

from any particular *madrasah* or belong to any particular group. However, any person expressing his opinion must sustain it on the basis of research.<sup>40</sup> Islahi cited the same example of the commission in which a lady corrected ‘Umar on the basis of Qur’anic verses. When ‘Umar found her right, he accepted her opinion and reconsidered his opinion. Islahi put forward three conditions for a person to perform *Ijtihad*:

1. The person must be well versed in the Qur'an and *Sunnah*.
2. The person should be capable of getting to the root of the problems and situations that arise and should understand thoroughly the fundamentals and relevant aspects thereof.
3. The personal character and morals must be above board, so that people can repose complete faith in him in matters of religion.<sup>41</sup>

The modernists opined that *Ijtihad* could be performing by any person or persons of knowledge (not religious) because ‘there is no priesthood in Islam’. According to Islahi, if this logic were accepted then it would mean that it is not essential that only experts of law should preside over the court of justice. It is everybody’s right to claim this position and make others to accept his opinion on legal issues. In the same manner, the imparting of medical treatment is not the prerogative of the doctors and physicians. Everybody should have the freedom to play with the lives of others in the way he likes.<sup>42</sup> Thus, those who acquire the required knowledge in religion and fulfil the essential conditions as we consider it necessary for doctors and legal experts should undertake *Ijtihad*.

Islahi considers *Ijtihad* a specialised job and a layman cannot perform it. In the words of Islahi, ‘it is the monopoly of the specialists in Islamic law’.<sup>43</sup> A person who acquired this expertise, whether a man or woman, an Arab or non-Arab, cannot be denied the right of doing *Ijtihad*.<sup>44</sup> On the other hand, an ‘*alim* (religious scholar) cannot carry out the job, if he is not conversant in Islamic law and does not fulfil the essential conditions of *Ijtihad*.<sup>45</sup>

The next important issue is the status of *Ijtihad* conducted by the legists in the past. The traditionalists awarded a very high esteem to it. In practical terms, they intermingle the views of the earlier jurists with the Qur'a#n and *Sunnah*. The ruling given by these jurists were originally intended to facilitate the application of *Shariah* principles to specific questions. In the course of time, these ruling attained in the

popular mind a kind of sanctified validity of their own. In addition, many Muslims regarded it as an integral part of the *Shariah*, the Canon law, itself.<sup>46</sup> In the modern times for an ordinary Muslim it is very difficult to differentiate the words of God and the holy Prophet from the words of men (meaning past jurists). Therefore, the best way for them is to consider every *Ijtihad* from the past as the *Shariah*. As far as 'ulama are concerned, they cannot imagine to carry out interpretation of the Qur'an and *Sunnah* without taking the views of the earlier religious scholars. On the other hand, some of the new brand of Muslim intellectuals pays no heed to the works of these jurists. Some of them even take the Hadith (tradition of prophet) merely as a piece of Muslim history and grant it no value. Islahi does not consider the individual *Ijtihad* of the earlier jurists binding for the subsequent generations. If *Ijtihad* is evaluated by another jurist in the light of Qur'an and *Sunnah* and found it weak, then it can be changed. *Ijma'* (consensus) is the highest form of *Ijtihad* carried out by jurists. The status of *ijma'* is different from other forms of *Ijtihad* like *qiyyas*. *Ijma'* is considered by majority of 'ulama as binding. If the earlier jurists were in general agreement on an issue, the later jurists had no right to disagree.<sup>47</sup> The view is based on one of the Hadith of the holy Prophet in which it is stated that God would not permit all of His people to be in error. The traditionalists consider *ijma'* as part of the *Shariah*. Mawdudi is also of the opinion that *ijma'* is a final authority. In his words

“When the *ijma'* has been arrived at on certain interpretation of a *nass* or on a certain *Ijtihad*, *Qiyas* or expediential legislation, then such an *ijma'* is binding on all and must be followed. Differences arise only as to the question whether there has been an *ijma'* on a certain legal point or not? No one challenges the authority of *ijma'* as such. The controversy hovers round the point; whether it has been arrived at or not!”<sup>48</sup>

Islahi took two aspects of the question i.e. whether an *Ijtihad* can be performed against the unanimous opinion of the great legist of the past? He says that rationally there is nothing objectionable in the plea that *Ijtihad* can be performed on the reported *ijma'*, because the early savants were not infallible and even their consensus was not free from

any shade of error.<sup>49</sup> However, Islahi opined that it is not essential that what is theoretically possible must also exist in the actual world. In the contemporary Muslim world, no body of the stature of these past jurists can be found. In such a situation how ordinary Muslims can trust the modernists verses Imam Abu Hanifa, Imam Shafi, Imam Malik and Imam Hanbal. The phenomenon of *taqlid* and *Ijtihad* has been depicted, as 'It is safer to follow the footsteps of the bygones than '*Ijtihad*' of the short-sighted scholars'.

Islahi draws the attention to the fact that 'the respect and devotion which the Muslims have for the great savants of law is not something accidental, or is not a product of sheer conservatism and *taqlid*. Not in the least. Conservatism and *taqlid* can influence some people or groups but can never blind the entire community'.<sup>50</sup> It can be deduced from Islahi's assertion that if people in the modern time establish credibility in knowledge and piety then they can change the *ijma'* of the earlier jurists. However, those upon whom people have no faith cannot carry out the task. Another Pakistani legal expert, S.M. Zafar, forwarded a different idea on the issue of *Ijtihad*. He said that every Muslim has the right to discuss religion and it is not confined to the 'ulama only, however, the community is not bound to adopt the view of an individual until it receive support and consensus of the 'ulama and scholars.<sup>51</sup>

In the contemporary world, when the Muslims are divided in many national states, if one state adopts a particular *Ijtihad* then what will be the status of this *Ijtihad* in other states? According to Islahi, *Ijtihad* would carry validity but only for those who are residing in that state. Other Muslims would not be bound to adopt or follow it.<sup>52</sup> In the same manner, another state can adopt another opinion contrary to the first one. It means that *ijma'* is not binding upon all the Muslims. However, Islahi gave more significance to the *ijma'* taken at the time of the pious caliphs. As far as the *ijma'* of the later period is concerned it is very difficult to provide enough evidence for the occurrence of an *ijma'*.<sup>53</sup> In the final analysis, it seems that the personal integrity, devotion and learning of an '*alim*', finally determined by the Muslim community can offer a way for an *Ijtihad* even in the modern times. The community can safely deduce keeping in view the entire history of Muslims that the higher degree of these qualities; the higher will be the acceptance of the *Ijtihad*. The recent Muslim history of the Indian Subcontinent provide

us enough evidence that the innovations of various Muslim leaders/scholars, from Sayyed Ahmad Khan to Ghulam Ahmad Pervez, were not upheld by the community, because Muslims had no trust in them in the domain of religion. Islahi pointed out that even persons like Imam Ibn Taymiya and Shah Walliullah faced enormous difficulties in their lives for conducting *Ijtihad* or evaluating the *Ijtihad* of the earlier jurists.<sup>54</sup> No doubt they faced problems, but it is also a fact that Muslim community accepted their scholarship in the coming days when their knowledge and personal integrity were affirmed. Both these scholars are now considered as established Muslim scholars and weightage is given to their views.

The fourth source of law according to Islahi is *ma'ruf*. It implies custom or usage in a society. Islahi derived it from the Qur'an. There are certain occasions in the Qur'an where the Muslims are asked in accordance with the established norms of the society. Islahi brought the following verses of the Qur'an such as,

“It is prescribed when death approaches any of you if he leave any goods that he make a bequest to parents and next of kin according to reasonable usage; this is due from the Allah-fearing.”<sup>55</sup>

“If the guardian is well-off let him claim no remuneration but if he is poor let him have for himself what is just and reasonable [according to the usage].”<sup>56</sup>

“If ye decide on a foster-mother for your offspring there is no blame on you provided ye pay (the mother) what ye offered on equitable terms [according to the usage].”<sup>57</sup>

“There is no blame on you if ye divorce women before consummation or the fixation of their dower; but bestow on them (a suitable gift) the wealthy according to his means and the poor according to his means; a gift of a reasonable amount [according the usage] is due from those who wish to do the right thing.”<sup>58</sup>

In all such verses, it is instructed that problems should be decided according to the custom of the society. However, Islahi asserted that the word used in the Qur'an, *ma'ruf*, is significant because it carries

certain aspect, which cannot be connoted by another word. The literal meaning of *ma'ruf* is 'well known' or 'generally recognised'. In the words of Islahi, *ma'ruf* refers to 'what is generally accepted by the noble side of human intelligence, what fulfils the demands of justice and fair play what is in vogue among and popularly acted upon by the righteous people of society'.<sup>59</sup> The use of the word *ma'ruf* also means that it 'ruled out all practices which are unacceptable to man's intelligence, or do not conform to the canons of justice, or they are popular only with that section of society which is morally and intellectually perverted'.<sup>60</sup> In declaring *ma'ruf* as a source of law, Islahi recognises the place of human practices, which sprung up from man's own considerations. The usage or custom is also the main spring of man-made laws. However, according to Islahi, all usage in a society cannot become a source of law. It comprises only those practices and customs, which are acceptable to the good in human nature and human intelligence. There should be nothing in a custom, which is repugnant to justice, morality or admitted standards of *Shariah*<sup>61</sup>

The Qur'an uses the term *ma'ruf* but does it imply the well-known usage of a particular society? As custom or usage varies from society to society, place to place, and time to time, what kind of custom should be taken into account? Islahi opined that, no doubt the term used in the Qur'an refers to the customs of the Arabs, because the first call by the Qur'an was indeed addressed to the Arab society. However, Islahi upheld the opinion of earlier scholars who interpreted *ma'ruf* as bearing a general application and did not confine to the customs of Arabs. Logically, it should be kept general. Islamic law has not been sent down to the Arabs only. Secondly, if it were confined to a particular nation then it would have lost the wisdom of offering a choice *ma'ruf*.<sup>62</sup> A law formulated on the basis of *ma'ruf* is not permanent. If the customs of a society change, then the law will be inevitably changed.<sup>63</sup>

The fifth source of Islamic law is *maslahat*. It refers to the general good or welfare of Islam and community. The sphere of *maslahat* is made up of acts coming under *mubahat* (permissible). The holy Prophet said, "I am only a mortal like you. In matters revealed to me by God, you must obey my instructions. Nevertheless, you know more about your own worldly affairs than I do. So my advice in these matters is not binding". This Hadith defined the sphere of *mubahat* (permissible). Within this domain, the Muslims have been left free to adopt whatever they find

good. They can formulate laws keeping in view the interest of the society. Islahi substantiates his opinion with the view of certain past jurist who, more or less, recognise the principle but with different terminology. He stated that what the Maliki School called '*masalih mursalah*' and the Hanfi School named *istihsan* highlight the same phenomenon.<sup>64</sup> According to Islahi whatever law is constituted on the basis of *ma'ruf* of the society will become an Islamic law. He opined that the concept of *istihsan* is based upon the formula of a great companion of the prophet and narrator of the traditions, Abdullah Bin Masud, 'whatever the Muslims consider to be in their benefit is good with Almighty Allah'.<sup>65</sup> It is very interesting that the principle of *istihsan* has also been widely cited and used by the modernist for their viewpoint regarding *Ijtihad*.<sup>66</sup> Islahi response to modernists' assertion is that no doubt, *istihsan* is the principle of Hanfi *fiqh* but meaning of this term is quite different from the meaning modernists allocate to it. It seems that modernists extend the sphere of *istihsan* to the immutable laws of *Shariah* also. Islahi condemns this extension and asserts that it is confined only to the changeable portion of law. According to Islahi, it is quite possible that expediency will change from one period to another and thus necessitate a change in the law. In that case, the law will have to be changed accordingly.<sup>67</sup>

### **Conclusion:**

The contemporary Muslim religious intellectual discourse is dominating over the issue of continuity and change in the Islamic law. The response of the ulama trained in the traditional religious schools usually resists a change and struck whatever they inherited from their teachers. On the other hand the modern educated Muslim scholars are sceptical about the legacy of the Muslim past. Islahi, being a madrasa graduate is not on the same wavelength with the ulama including on the subject of sources of Islamic law. On the other hand his views are also coinciding with the modern educated intellectual and do not allow them to discredit the Muslim intellectual legacy. Islahi's view on the object is an effort to combine revealed knowledge with the human intellectual tradition.

## Endnotes and References

<sup>1</sup> Islahi's views also appeared in *Report of the Commission on Marriage and Family Laws* in Khurshid Ahmad (ed.), *Marriage Commission Report X-Rayed* (Karachi: Chiragh-e-Rah Publications, 1959).

<sup>2</sup> Mawlana Amin Ahsan Islahi, *Islamic Law: Concept and Codification*. tran. S.A. Rauf (Lahore: Pakistan: Islamic Publications, Ltd., 1979), p.27

<sup>3</sup> Islahi, *Islamic Law Concept and Codification*, pp.33-34

<sup>4</sup> Amin Ahsan Islahi, *Tadabbur-i-Qur'an*, Vol. 1. 5<sup>th</sup> ed. (Lahore: Faran Foundation, 1993), p. 15.

<sup>5</sup> *Muhadith*, Lahore, August, 2001, p.64

<sup>6</sup> Islahi, *Islamic Law Concept and Codification*, p.35.

<sup>7</sup> Islahi, *Tadabbur-i-Qur'an* Vol. 1, p. 16.

<sup>8</sup> Mawlana Amin Ahsan Islahi, *Islami Qanun ki Tadwin* (Codification of Islamic Law) (2nd ed.). (Lahore: Islamic Publications, 1989), p.23.

<sup>9</sup> Shah Walliullah, *Al-Fawz al-kabir fi Usul al-Tafsir* (Lahore: Al Maktabat al-'ilmiyah, 1970), pp.1-4.

<sup>10</sup> Prof. Abdul Rauf Zafar, 'Mawlana Amin Ahsan Islahi ka Nazriya Hadis', *Muhadath*, Lahore, August, 2001, pp.65-66

<sup>11</sup> Islahi, *Islami Qanun ki Tadwin*, p.39.

<sup>12</sup> Muhammad Ismail Salafi. *Hujjat-i-Hadith* (Lahore: Islamic Publishing House, 1981), p.19.

<sup>13</sup> Quran, 33:38

<sup>14</sup> Quran, 35:43

<sup>15</sup> Mawlana Amin Ahsan Islahi, 'Difference between Hadith and Sunnah', *Renaissance*, January & February 1998, p.67.

<sup>16</sup> Ibid.

<sup>17</sup> Ibid., p.70.

<sup>18</sup> Javid Ahmad Ghamidi, *Mizzan* (Lahore: Dar ul Ishraq, Lahore, 2001), p.10.

<sup>19</sup> Nasim Ahmad Javed, *Islam's Political Culture-Religion and Politics in Predivided Pakistan* (Karachi: Oxford University Press, 2001), p.93.

<sup>20</sup> Patrick Bennerman, *Islam in Perspective A Guide to Islamic Society, Politics and Law* (London: Rutledge for The Royal Institute of International Affairs, 1988), p.38.

<sup>21</sup> Report of the Commission on Marriage and Family Laws in Khurshid Ahmad (ed.), *Marriage Commission Report X-Rayed*, Chiragh-e-Rah Publications, Karachi, pp.36-37 here on cited as Commission Report.

<sup>22</sup> Ibid, p.38.

<sup>23</sup> Ibid, p.41.

<sup>24</sup> Ibid, p.39.

<sup>25</sup> Ibid, p.40.

<sup>26</sup> Ibid, p.42.

<sup>27</sup> Ibid, p.46.

<sup>28</sup> Ibid, p. 45.

<sup>29</sup> Ibid, p.46.

<sup>30</sup> Ibid, p.48.

<sup>31</sup> Fazalur Rahman “Implementation of the Islamic Concept of State in the Pakistani milieu”, *Islamic Studies* 6 (1967), pp. 205-24 reproduced in John j. Donohue and John L. Esposito, *Islam in Transition Muslim Perspective*, Oxford University Press, New York, 1982, p.262.

<sup>32</sup> For example on the punishment of fornication of a married couple, he differs with the entire community of the ‘ulama not only of the contemporary but those of the past also. He opposed the stance of the early jurists and opined that the punishment of fornication is only eighty strips and not stoning to death.

<sup>33</sup> Islahi, *Islamic Law Concept and Codification*, p.57.

<sup>34</sup> Ibid, p.58.

<sup>35</sup> Ibid, p.51.

<sup>36</sup> Alamgir Muhammad Serajuddin, *Shari'a Law and Society Tradition and Change in South Asia* (Karachi : Oxford University Press, 2001), p.58.

<sup>37</sup> Khalifa Abdul Hakim, *Islamic Ideology* (3<sup>rd</sup> ed.) (Lahore: Institute of Islamic Culture, 1965), p.208.

<sup>38</sup> Amin Ahsan Islahi, ‘Marriage Commission Report X-Rayed’ (translated by Khurshid Ahmad) in Khurshid Ahmad (ed.) *Marriage Commission Report X-Rayed*, p. 112. Here on cited as Report X-Rayed.

<sup>39</sup> X-Rayed. p.112.

<sup>40</sup> X-Rayed. p.143.

<sup>41</sup> Islahi, *Islamic Law Concept and Codification*, p.55.

<sup>42</sup> X-Rayed. .p142.

<sup>43</sup> Islahi, *Islami Qanwan ki Tadwin*, p.108.

<sup>44</sup> Ibid., p.108.

<sup>45</sup> Ibid.

<sup>46</sup> Bennerman, *Islam in Perspective*, p.53.

<sup>47</sup> Mawlana Ihtishamul Haq note of dissent on the Report of the Commission on Marriage and Family Laws cited by Serajuddin, p.48.

<sup>48</sup> Syed Abul Ala Maududi, *The Islamic Law and Constitution*, trans. and ed. Khurshid Ahmad, (Lahore: Islamic Publications, 1960), p. 91.

<sup>49</sup> Mawlana Amin Ahsan Islahi, 'Aili Commission Report par Tabsirah (Criticism on the Family Laws). (Layalpur (now Faisalabad): Malak Ghulam Rasul (Malak Brothers Tajiran-i-Kutub), [1960], p. 55.

<sup>50</sup> X-Rayed. p.146.

<sup>51</sup> S. M. Zafar, 'Awam, *Parliament and Islam* (Lahore: Aina-i-Adab, 1980), p. 28.

<sup>52</sup> Islahi, *Islami Qanwun ki Tadwin*, p.75.

<sup>53</sup> Ibid., pp.73-74.

<sup>54</sup> X-Rayed. p.146.

<sup>55</sup> Quran, 2:180

<sup>56</sup> Quran, 4:6

<sup>57</sup> Quran, 2:233

<sup>58</sup> Quran, 2:236

<sup>59</sup> Islahi, *Islamic Law Concept and Codification*, p.78.

<sup>60</sup> Ibid.

<sup>61</sup> Ibid.

<sup>62</sup> Islahi, *Islami Qanwun ki Tadwin*, p.80.

<sup>63</sup> Ibid., p.84.

<sup>64</sup> Islahi, *Islamic Law Concept and Codification*, p.81.

<sup>65</sup> Ibid.

<sup>66</sup> Commission Report, p.45.

<sup>67</sup> Islahi, *Islami Qanwun ki Tadwin*, p.84.